Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12ANCvC-144–10 OF 2018
WONG KIAN KHEONG J
24 JUNE 2019

Contract — Agreement — Sale and purchase agreement — Appellant claimed damages against respondent for delay in delivery of vacant possession — Settlement agreement between appellant and respondent — Whether plaintiff entered into settlement agreement with defendant — Whether settlement agreement invalid under Housing Development (Control and Licensing) Act 1966 and Housing Development (Control and Licensing) Regulations 1989 read with s 24 of the Contracts Act 1950 — Whether plaintiff estopped by settlement agreement from filing suit — Contracts Act 1950 ss 24 & 64 — Housing Development (Control and Licensing) Act 1966 ss 16AB(a), 16T(1), (2) & (3)

The appellant ('plaintiff') had entered into a sale and purchase agreement ('the SPA') with the respondent ('defendant') whereby the plaintiff had purchased a parcel in a residential apartment. There was a delay by the defendant in the handing over of delivery of vacant possession of the parcel to the plaintiff. Due to the delay, the plaintiff filed this suit in the sessions court against the defendant and claimed liquidated damages totalling RM261,399.63 ('the claimed sum'). The defendant applied to strike out the suit on the ground that the plaintiff and defendant had entered into a settlement agreement regarding the claimed sum. The sessions court allowed the defendant's application with costs on the ground that there had been a settlement agreement between the plaintiff and defendant regarding the claimed sum. Hence, this appeal by the plaintiff. The issues for consideration were: (a) whether the plaintiff entered into a settlement agreement with the defendant regarding the claimed sum pursuant to s 64 of the Contracts Act 1950 ('the CA'); (b) whether the settlement agreement was invalid under the Housing Development (Control and Licensing) Act 1966 ('the HDA') and Housing Development (Control and Licensing) Regulations 1989 ('the HDR') read with s 24 of the CA; and (c) whether the plaintiff was estopped by the settlement agreement from filing the suit.

Held, dismissing the appeal with costs:

(1) The learned sessions court judge was right in deciding that there had been a concluded settlement agreement between the plaintiff and defendant regarding the claimed sum ('the SA'). The SA was evident in a letter

written by the plaintiff to the defendant ('the plaintiff's letter'). The SA had been partially performed by the defendant when the defendant forwarded three cheques to the plaintiff by way of a letter ('the defendant's letter'). The contents of the plaintiff's letter and the defendant's letter were clear. If the SA was not ambiguous, there could not be any room to apply the contra proferentem rule of construction to the SA. Another reason why the contra proferentem rule could not apply was because the plaintiff's letter was not drafted by the defendant. The SA constituted a full and final settlement of any dispute between the plaintiff and the defendant regarding liquidated damages due under cll 25 and 27 (see paras 10–13).

(2) Housing developers and home buyers may enter into settlement agreements to settle any dispute arising from SPA's concerning housing accommodation. The reasons were: (a) housing developers and home buyers had the freedom of contract to enter into settlement agreements regarding housing accommodation where such a freedom could only be restricted or abrogated by clear words of written law; (b) settlement agreements were valid under s 64 of the CA; (c) there was nothing in the HDA and HDR which invalidated a settlement agreement concluded under s 64 of the CA; (d) ss 16T(1), (2), (3) and 16AB(a) of the HDA provided specifically for settlement agreements between housing developers and home buyers; (e) the Legislature had not intended for the HDA to invalidate settlement agreements between housing developers and home buyers when the Parliament had passed Housing Developers (Control and Licensing) (Amendment) Act 2002 which provided for the Tribunal for Homebuyer Claims to assist in the negotiation of a settlement agreement and to record such an agreement; (f) the validity of a settlement agreement between a housing developer and home buyer was recognised in the case of *Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor* [2014] MLJU 1932; [2015] 2 CLJ 252; and (g) it was in the public interest for the law to recognise the validity of settlement agreements. The SA was a new agreement to settle the claimed sum. Accordingly, the SA did not constitute an attempt to contract out of the HDA and HDR (see paras 16 & 18).

(3) As the SA was valid under the HDA and HDR, the plaintiff was estopped by the SA from instituting this suit (see para 20).

[Bahasa Malaysia summary

Perayu ('plaintif') telah menandatangani perjanjian jual beli ('SPA') dengan responden ('defendan') di mana plaintif telah membeli petak di sebuah apartmen kediaman. Terdapat kelewatan oleh defendan dalam serahan milikan kosong petak kepada plaintif. Disebabkan oleh kelewatan itu, plaintif mengemukakan guaman ini di mahkamah sesyen terhadap defendan dan menuntut ganti rugi jumlah tertentu berjumlah RM261,399.63 ('jumlah yang

dituntut'). Defendan memohon untuk membatalkan tuntutan tersebut dengan alasan plaintif dan defendan telah membuat perjanjian penyelesaian mengenai jumlah yang dituntut. Mahkamah sesyen membenarkan permohonan defendan dengan kos dengan alasan bahawa terdapat perjanjian penyelesaian antara plaintif dan defendan mengenai jumlah yang dituntut. Oleh itu, rayuan ini oleh plaintif. Isu-isu untuk pertimbangan adalah: (a) sama ada plaintif memasuki perjanjian penyelesaian dengan defendan mengenai jumlah yang dituntut berdasarkan s 64 Akta Kontrak 1950 ('AK'); (b) sama ada perjanjian penyelesaian tidak sah di bawah Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('APP') dan Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 ('PPP') dibaca dengan s 24 AK; dan (c) sama ada plaintif dihalang oleh perjanjian penyelesaian daripada mengemukakan tuntutan.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim mahkamah sesyen yang bijaksana adalah betul dalam memutuskan bahawa terdapat perjanjian penyelesaian antara plaintif dan defendan mengenai jumlah yang dituntut ('SA'). SA terbukti dalam surat yang ditulis oleh plaintif kepada defendan ('surat plaintif'). SA telah dilakukan sebahagian oleh defendan ketika defendan mengirimkan tiga cek kepada plaintif melalui surat ('surat defendan'). Isi surat plaintif dan surat defendan adalah jelas. Sekiranya SA tidak samar-samar, tidak mungkin ada ruang untuk menggunakan peraturan *contra proferentem* kepada SA. Sebab lain mengapa peraturan contra proferentem tidak dapat digunakan adalah kerana surat plaintif tidak ditulis oleh defendan. SA merupakan penyelesaian penuh dan akhir setiap perselisihan antara plaintif dan defendan mengenai ganti rugi jumlah tertentu di bawah klausa 25 dan 27 (lihat perenggan 10–13).

(2) Pemaju perumahan dan pembeli rumah dapat membuat perjanjian penyelesaian untuk menyelesaikan setiap perselisihan yang timbul dari SPA mengenai penginapan perumahan. Sebabnya adalah: (a) pemaju perumahan dan pembeli rumah mempunyai kebebasan kontrak untuk membuat perjanjian penyelesaian mengenai penginapan perumahan di mana kebebasan tersebut hanya dapat dibatasi atau dibatalkan dengan kata-kata undang-undang yang jelas; (b) perjanjian penyelesaian adalah sah di bawah s 64 AK; (c) tiada apa-apa dalam APP dan PPP yang membatalkan perjanjian penyelesaian yang dimeterai di bawah s 64 AK; (d) s 16T(1), (2), (3) dan 16AB(a) APP disediakan khusus untuk perjanjian penyelesaian antara pemaju perumahan dan pembeli rumah; (e) badan legislatif tidak berniat untuk APP membatalkan perjanjian penyelesaian antara pemaju perumahan dan pembeli rumah ketika Parlimen telah meluluskan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 yang memperuntukkan Tribunal untuk Tuntutan Pembeli Rumah untuk membantu dalam rundingan perjanjian

penyelesaian dan mencatat perjanjian tersebut; (f) kesahihan perjanjian penyelesaian antara pemaju perumahan dan pembeli rumah diakui dalam kes *Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor* [2014] MLJU 1932; [2015] 2 CLJ 252; dan (g) adalah demi kepentingan umum undang-undang untuk mengiktiraf kesahihan perjanjian penyelesaian. SA adalah perjanjian baru untuk menyelesaikan jumlah yang dituntut. Oleh itu, SA bukan merupakan usaha untuk mengecualikan APP dan PPP (lihat perenggan 16 & 18).

(3) Oleh kerana SA adalah sah di bawah APP dan PPP, plaintif telah dihalang oleh SA daripada memulakan guaman ini (lihat perenggan 20).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285; [1985] CLJ Rep 77, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)

Faber Union Sdn Bhd v Chew Nyat Shong & Anor [1995] 2 MLJ 597; [1995] 3 CLJ 797, SC (refd)

Khau Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

MK Retnam Holdings Sdn Bhd v Bhagat Singh [1985] 2 MLJ 212; [1985] CLJ Rep 199, SC (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124, SC (refd)

Novaviro Technology Sdn Bhd v QL Plantation Sdn Bhd & Anor (Watermech Engineering Sdn Bhd, third party) [2018] 11 MLJ 392, HC (refd)

Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor [2014] MLJU 1932; [2015] 2 CLJ 252, CA (folld)

Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)

Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), (e), 64

Courts of Judicature Act 1964 s 27

Housing Development (Control and Licensing) Act 1966 ss 3, 16A, 16B, 16C, 16D, 16E, 16F, 16G, 16H, 16I, 16J, 16K, 16L, 16M, 16N, 16O, 16P, 16Q, 16R, 16S, 16T, 16T(1), (2), (3), 16U, 16V, 16W, 16X, 16Y, 16Z, 16AA, 16AB, 16AB(a), 16AC, 16AD, 16AE, 16AF,

16AG, 16AH, 16AI, Part VI
Housing Development (Control and Licensing) Regulations 1989 reg 11(1), (3), Schedule H
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d), O 20 rr 5(1), 8(1), O 55 r 5(1), O 92 r 4

Rajasegaran a/l Karruppiah (Rajveen Kaur with him) (Pretam Singh, Nor & Co) for the appellant.
Sam How Pek Lean (Kau Hui Ni with him) (Lim Soh & Goonting) for the respondent.

Wong Kian Kheong J:

INTRODUCTION

[1] This appeal raises a novel question of whether a settlement agreement regarding liquidated damages for late delivery of vacant possession ('VP') of 'housing accommodation' between a housing developer and home buyer made pursuant to s 64 of the Contracts Act 1950 ('the CA') is invalid under the Housing Development (Control and Licensing) Act 1966 ('the HDA') and Housing Development (Control and Licensing) Regulations 1989 ('the HDR') read with s 24 of the CA.

BACKGROUND

[2] I will refer to the parties in this judgment as they are in the sessions court ('SC').

[3] The plaintiff company ('the plaintiff') had entered into a sale and purchase agreement ('SPA') with the defendant company ('the defendant') whereby the plaintiff had purchased parcel No P02–023A ('parcel') in a residential apartment known as 'Empire Residence' ('building').

[4] The SPA is in the form provided in Schedule H to the HDR.

[5] There was a delay by the defendant in the handing over of delivery of VP of the parcel to the plaintiff ('defendant's delay'). Due to the defendant's delay, the plaintiff filed this suit in the SC against the defendant ('suit') and claimed liquidated damages totaling RM261,399.63 ('claimed sum'). The claimed sum is computed by the plaintiff as follows:

(a) pursuant to cl 25(1) and (2) of the SPA (cl 25), a sum of RM225,863.02 for the delay in the delivery of VP of the parcel;

(b) by reason of cl 27(1) and (2) of the SPA (cl 27), liquidated damages amounting to RM45,172.61 in respect of the delay in the completion of the 'common facilities' of the building; and

(c) the defendant has paid a sum of RM9,636 to the plaintiff pursuant to a purported settlement agreement between the plaintiff and defendant regarding the claimed sum.

[6] The defendant applied to strike out the suit on the ground that the plaintiff and defendant had entered into a settlement agreement regarding the claimed sum ('defendant's application').

[7] The SC allowed the defendant's application with costs on the ground that there had been a settlement agreement between the plaintiff and defendant regarding the claimed sum. Hence, this appeal.

ISSUES

[8] The following questions arise in this appeal:

(a) has the plaintiff entered into a settlement agreement with the defendant regarding the claimed sum pursuant to s 64 of the CA?

(b) if there is a settlement agreement, whether the settlement agreement is invalid under HDA and HDR read with s 24 of the CA; and

(c) if the settlement agreement is valid, is the plaintiff estopped by the settlement agreement from filing the suit?

THE PLAINTIFF'S CONTENTIONS

[9] In support of this appeal, the plaintiff's learned counsel, Mr Rajasegaran a/l Karruppiah, has submitted as follows:

(a) the purported settlement agreement between the plaintiff and defendant is void under HDA and HDR for the following reasons:

(i) based on the 'Preamble' to HDA, HDA is a piece of 'social legislation' which is intended to protect home buyers. I think Mr Rajasegaran is referring to the long title of the HDA ('long title'). The long title states that HDA is to 'provide for … the protection of the interest of purchasers';

(ii) the plaintiff is entitled to the claimed sum under cll 25 and 27. Such a right of the plaintiff is a 'public right' which is protected by HDA and HDR; and

(iii) the purported settlement agreement is a 'Supplementary

Agreement' to the SPA which requires the 'written consent' of the Controller of Housing ('controller') under reg 11(1) and (3) HDR. The purported settlement agreement is invalid because the controller has not given his written consent to such an agreement.

To support the above contention, Mr Rajasegaran cited the following cases:

(1) the decision of Hashim Yeop Sani SCJ (as he then was) in the Supreme Court case of *MK Retnam Holdings Sdn Bhd v Bhagat Singh* [1985] 2 MLJ 212; [1985] CLJ Rep 199;

(2) the Federal Court's judgment delivered by Mohd Azmi FJ in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285; [1985] CLJ Rep 77; and

(3) VC George J's (as he then was) decision in the High Court case of *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335;

(b) the defendant had wrongly computed the amount of liquidated damages due from the defendant to the plaintiff under cll 25 and 27. The plaintiff relies on the Mohd Eusoff bin Chin CJ's judgment in the Federal Court case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597; [1995] 3 CLJ 797;

(c) if the purported settlement agreement is valid:

(i) the defendant has breached the purported settlement agreement; and

(ii) the 'contra proferentem' rule of interpretation shall be applied against the defendant regarding the purported settlement agreement; and

(d) the Ministry of Housing and Local Government ('KPKT') had given to the defendant an extension of six months to deliver VP of parcels and Common Facilities of the building ('KPKT's extension'). KPKT's extension was subject to, among others, a condition that the defendant was to enter into supplementary SPA agreements with the purchasers of the parcels in the building ('KPKT's condition'). The defendant did not comply with KPKT's Condition.

WHETHER THE PLAINTIFF HAS CONCLUDED SETTLEMENT AGREEMENT WITH THE DEFENDANT REGARDING CLAIMED SUM

[10] I am of the view that the learned sessions court judge ('SCJ') is right in deciding that there has been a concluded settlement agreement between the

plaintiff and defendant regarding the claimed sum ('SA'). The SA is evident in a letter dated 14 July 2016 written by the plaintiff to the defendant ('the plaintiff's letter'). I reproduce below the plaintiff's letter:

Date: 14/7/16

[*Plaintiff*]

To: [*defendant*]

Dear Sirs,

SETTLEMENT OF LIQUIDATED DAMAGES FOR LATE DELIVERY OF [VP] BY WAY OF SET OFF/PAYMENT

[SPA]

PROJECT : EMPIRE RESIDENCE

[Parcel]

PURCHASE PRICE : RM1,648,800.00

...

Further to the meeting/tele-conversation between your sales administrative personnel and myself/ourselves, I/We acknowledge and agree to the following calculations:-

Items	Period	
Liquidated damages for late delivery of the [Parcel]	13/8/2015–18/12/2015	RM(57,820.93 ('Liquidated Damages')
Interest on late payment of progressive payments	As per Statement of Accounts dated 18/12/2015	RM1,422.94 ('Outstanding Interest Charges')
Miscellaneous Charges	As per Statement of Accounts dated 18/12/2015	RM5,116.73 ('Outstanding Misc. Charges')
Balance Liquidated Damages Payable (by 18 monthly instalments)		RM(51,281.26)

I/We confirm that you are authorized to deduct the Outstanding Interest Charges and the Outstanding Miscellaneous Charges from out [sic] of the Liquidated Damages.

I/We acknowledge and agreed [sic] that the above Balance Liquidated Damages shall be deemed as full and final settlement of any sums and claims that I/We may have against you for late delivery of [VP] of the [Parcel].

...

Yours faithfully,

[Plaintiff]

(Emphasis added.)

[11] The SA has been partially performed by the defendant when the defendant forwarded three cheques totaling RM9,636 to the plaintiff by way of a letter dated 29 March 2017 ('the defendant's letter'). The relevant part of the defendant's letter states as follows:

> [*Defendant*]
>
> ...
>
> *Date: 28/03/2017*
>
> [*Plaintiff*]
>
> ...
>
> Dear Sirs/Madam,
>
> *PROJECT : EMPIRE RESIDENCE*
>
> *[Parcel]*
>
> *PURCHASE PRICE: RM1,648,800.00*
>
> *SUBJECT : BALANCE LIQUIDATED DAMAGES (RM57,820.93)*
>
> *We refer to the above matter and your acceptance of the Settlement of Liquidated Damages for the late delivery of [VP] by way of set off/payment which we received on 15/07/2016.*
>
> *We enclose herewith three (3) installment cheques for the sum of RM9,636.00 being payment for the Balance Liquidated Damages in respect of the above Parcel ('Balance Liquidated Damages').*
>
> *Please acknowledge receipt.*
>
> ...
>
> [*Defendant*]
>
> *I, [Plaintiff] hereby acknowledge receipt and agreed the above Balance Liquidated Damages made payable to [Plaintiff] shall be deemed as full and final settlement of any sums and claims that I/We may have against you for late delivery of [VP] of the [Parcel].*
>
> ...
>
> [*Plaintiff*]
>
> Date: 29/3/17
>
> (Emphasis added.)

[12] The contents of the plaintiff's letter and the defendant's letter are clear. If the SA is not ambiguous, there cannot be any room to apply the *contra proferentem* rule of construction to the SA — please see the Supreme Court's judgment delivered by Lee Hun Hoe CJ (Borneo) in *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 at p 126. There is another reason why the *contra proferentem* rule cannot apply in this case — the plaintiff's letter is not drafted by the defendant.

[13] I cannot accept the plaintiff's contention that there has been a miscalculation of the amount of liquidated damages due from the defendant to the plaintiff under cll 25 and 27. This is because whatever sum of liquidated damages is actually owed by the defendant to the plaintiff, the SA constitutes a full and final settlement of any dispute between the plaintiff and defendant regarding liquidated damages due under cll 25 and 27.

[14] The question of whether the defendant has breached KPKT's condition or otherwise, in my view, is irrelevant to the issue regarding the validity of the SA.

IS SA INVALID UNDER THE HDA AND HDR?

[15] The HDA and HDR apply to SPA's between housing developers and purchasers of 'housing accommodation' (defined in s 3 of the HDA).

[16] I am of the view that housing developers and home buyers may enter into settlement agreements to settle any dispute arising from SPA's concerning housing accommodation. The reasons for this view are as follows:

(a) housing developers and home buyers have the freedom of contract to enter into settlement agreements regarding housing accommodation — please see the judgment of Gopal Sri Ram FCJ in the Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at para [10]. Such a freedom can only be restricted or abrogated by clear words of written law;

(b) settlement agreements are valid under s 64 of the CA. I reproduce below the relevant part of s 64 of the CA:

> *64 Promisee may dispense with or remit performance of promise*
>
> *Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him*, or may extend the time for such performance, *or may accept instead of it any satisfaction which he thinks fit.*
>
> *ILLUSTRATIONS*
>
> ...
>
> (b) *A owes B RM5,000. A pays to B, and B accepts, in satisfaction of the whole debt, RM2,000 paid at the time and place at which the RM5,000 were payable. The whole debt is discharged.*
>
> (c) *A owes B RM5,000. C pays to B RM1,000 and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.*
>
> (d) *A owes B under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction*

thereof, accepts the sum of RM2,000. This is a discharge of the whole debt, whatever may be its amount.

(e) *A owes B RM2,000, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of fifty cents in the dollar upon their respective demands. Payment to B of RM1,000 is a discharge of B's demand.* (Emphasis added.)

(c) there is nothing in the HDA and HDR which invalidates a settlement agreement concluded under s 64 of the CA. Nor is there any provision in HDA and HDR which requires the controller to approve or consent to the settlement agreement before the settlement agreement can take effect.

Regulation 11(3) of the HDR does not invalidate any SPA between a housing developer and home buyer, let alone a settlement agreement. I reproduce below reg 11(3) of the HDR:

Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the [SPA] is impracticable or unnecessary, he may, be certificate in writing waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of time stipulated for the handing over of [VP] under the [SPA] or after the validity of any extension of time, if any, granted by the Controller. (Emphasis added.)

Regulation 11(3) of the HDR only concerns the controller's power to waive or modify any provision in SPA's provided that any one of the conditions stated in reg 11(3) of the (subject to the proviso to reg 11(3) of the HDR) is satisfied. There is nothing in reg 11(3) of the HDR which requires the controller's approval of or consent to a settlement agreement before the settlement agreement can be effective;

(d) with effect from 1 December 2002, by way of Housing Developers (Control and Licensing) (Amendment) Act 2002 (Act A1142), Parliament has introduced, among others, a new Part VI (ss 16A–16AI) regarding 'Tribunal for Homebuyer Claims' ('Tribunal'). Sections 16T(1), (2), (3) and 16AB(a) of the HDA provide specifically for settlement agreements between housing developers and home buyers. Sections 16T and 16AB HDA provide as follows:

16T *Negotiation for settlement.*

(1) *The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.*

(2) *Without limiting the generality of subsection (1), in making an assessment the Tribunal shall have regard to any factors that, in the opinion of the Tribunal, are*

likely to impair the ability of either or both of the parties to negotiate an agreed settlement.

(3) *Where the parties reach an agreed settlement, the Tribunal shall approve and record the settlement and the settlement shall then take effect as if it were an award of the Tribunal.*

(4) Where —

(a) it appears to the Tribunal that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim; or

(b) the parties are unable to reach an agreed settlement in relation to the claim,

the Tribunal shall proceed to determine the dispute.

16AB *Orders and settlement to be recorded in writing.*

The Tribunal shall make or cause to be made a written record of the terms of —

(a) *every agreed settlement reached by the parties under subsection 16T(3)*; ... (Emphasis added.)

If the Tribunal can record settlement agreements under ss 16T(3) and 16AB(a) of the HDA, settlement agreements cannot be invalid under the HDA or HDR;

(e) there is a rebuttable statutory presumption that Parliament is deemed to know existing law — please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 754. When the Legislature passed the HDA (in 1966) and subsequent amendments to the HDA ('subsequent amendments'), the Legislature is deemed to know about the existing s 64 of the CA. If Parliament had intended the HDA to override s 64 of the CA regarding settlement agreements, Parliament would have expressly done so when Parliament passed HDA and subsequent amendments. Parliament however did not do so. On the contrary, Parliament has passed A1142 which provides for the Tribunal to assist in the negotiation of a settlement agreement and to record such an agreement. It is therefore clear that the Legislature has not intended for HDA to invalidate settlement agreements between housing developers and home buyers;

(f) in the Court of Appeal case of *Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor* [2014] MLJU 1932; [2015] 2 CLJ 252 at paras [23]–[25] and [30], Mohamad Ariff Yusof JCA has recognised the validity of a settlement agreement between a housing developer and home buyer as follows:

[23] *In our view, the substance of the appeal turned on the validity of the settlement agreement. It seemed to us obvious on the evidence that the respondents*

(especially the first respondent) had expressly agreed to waive the LAD claimable under the SPA. It could not be said this waiver was a mere suggestion. Why would the respondents execute the settlement agreement except to agree to waive the earlier LAD and to accept the new completion date? ...

[24] *On the law, the signing of the settlement agreement would fall within the terms of s 64 [CA] which deals with the 'dispensation' of a promise made to a promisee*: ...

[25] *The appellant's claim could only be defeated if the settlement agreement was illegal and flouted s 24 [CA], as either an agreement forbidden by law, or of such a nature as would defeat any law, or would be opposed to public policy. In this appeal, the respondents took a firm view on the effect of the [HDA] and reg 11(1) [HDR], in effect arguing that the LAD provision in the Schedule G standard form SPA could not be contracted out* ...

...

[30] ... *In terms of policy, there should be nothing illegal in law for a Settlement Agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist*. (Emphasis added.)

As a matter of stare decisis, the Court of Appeal's decision in *Oxbridge Height* is binding on this court; and

(g) it is in the public interest for the law to recognise the validity of settlement agreements. Through amicable settlements, all disputes regarding SPA's of housing accommodation may be finally, expeditiously and economically disposed. Needless to say, if disputes regarding SPA's of housing accommodation are amicably resolved by way of settlements agreements, the courts will not be burdened with these disputes.

[17] Section 24 of the CA provides as follows:

24 *What considerations and objects are lawful, and what not.*

The consideration or object of an agreement is lawful, unless —

(a) *it is forbidden by a law*;

(b) *it is of such a nature that, if permitted, it would defeat any law*;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

A (e) *the court regards it as immoral, or opposed to public policy*.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (Emphasis added.)

B In view of the reasons explained in the above para 16, it is clear that SA is not illegal and void under s 24(a), (b) and (e) of the CA.

[18] It is to be noted that the SA is a new agreement to settle the claimed sum. Accordingly, the SA does not constitute an attempt to contract out of the C HDA and HDR.

[19] I should add that none of the cases cited by the plaintiff has decided that a settlement agreement between a housing developer and home buyer of housing accommodation is invalid under HDA and HDR.

D

IS THE PLAINTIFF ESTOPPED FROM FILING SUIT?

[20] As the SA is valid under HDA and HDR, the plaintiff is estopped by the SA from instituting this suit — please see the Federal Court's judgment E delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 343; [1995] 4 CLJ 283 at p 294.

WHETHER THE PLAINTIFF CAN ALLEGE THAT THE DEFENDANT F HAS BREACHED SA

[21] I am not able to accede to the plaintiff's contention that the defendant has breached the SA. This is because the amended statement of claim (ASOC) has not pleaded the defendant's breach of the SA. On the contrary, the ASOC G pleaded that the defendant was liable for liquidated damages under cll 25 and 27. The plaintiff did not apply for leave of court under O 20 rr 5(1) and 8(1) of the Rules of Court 2012 ('the RC') to amend ASOC to include an alternative claim that the defendant had breached the SA. The plaintiff is bound by its own pleading in the ASOC — please see the Federal Court's judgment delivered by H Azahar Mohamed FCJ in *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492 at para [41].

SHOULD THERE BE AN APPELLATE INTERVENTION IN THIS APPEAL?

I

[22] The learned SCJ has a judicial discretion to allow or dismiss the defendant's application under O 18 r 19(1) of the RC — please see *Novaviro Technology Sdn Bhd v QL Plantation Sdn Bhd & Anor (Watermech Engineering Sdn Bhd, third party)* [2018] 11 MLJ 392 at para [28].

[23] In deciding an appeal against an exercise of a judicial discretion by a lower court, an appellate court should be slow to set aside the lower court's exercise of discretion — please see the Federal Court's judgment delivered by Arifin Zakaria CJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145 at para [236].

[24] Sitting in an appellate capacity under s 27 of the Courts of Judicature Act 1964 and O 55 r 5(1) of the RC, I find no reason to intervene in this appeal because based on the SA, the learned SCJ has correctly exercised his discretion to strike out this suit on any one or more of the following grounds:

(a) the suit is frivolous and/or vexatious under O 18 r 19(1)(b) of the RC; and/or

(b) the suit constitutes an abuse of court process within the meaning of O 18 r 19(1)(d), O 92 r 4 of the RC and/or under the court's inherent jurisdiction.

THIS COURT'S DECISION

[25] The upshot is a dismissal of this appeal with costs.

Appeal dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali